

Order

Michigan Supreme Court
Lansing, Michigan

Entered:
August 1, 2002

2001-11

Amendment of Rule 3.603 of
the Michigan Court Rules

Maura D. Corrigan,
Chief Justice

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman,
Justices

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the amendment of Rule 3.603 of the Michigan Court Rules is adopted, effective January 1, 2003.

[The present language of Rule 3.603 is amended as indicated below.]

Rule 3.603 Interpleader.

(A)-(D) [Unchanged.]

(E) Actual Costs. The court may award actual costs to an interpleader plaintiff. For the purposes of this rule, actual costs are those costs taxable in any civil action, and a reasonable attorney fee as determined by the trial court.

- (1) The court may order that the plaintiff's actual costs of filing the interpleader request, tendering the disputed property to the court, and participating in the case as a disinterested stakeholder be paid from the disputed property or by another party.
- (2) If the plaintiff incurs actual costs other than those described in subrule (1) due to another party's unreasonable litigation posture, the court may order that the other party pay those additional actual costs.
- (3) An award made pursuant to this rule may not include reimbursement for the actual costs of asserting the plaintiff's own claim to the disputed property, or of supporting or opposing another party's claim.

Staff Comment: The August 1, 2002, amendment, effective January 1, 2003, added subrule (E). It authorizes courts to award actual costs, including a reasonable attorney fee, to an interpleader plaintiff. Depending on the circumstances, the court may order that the money be paid either from the disputed property or by another party. See *Terra Energy, Ltd v Michigan*, 241 Mich App 393 (2000), lv den 463 Mich 994 (2001).

The staff comment is published only for the benefit of the bench and bar and is not an authoritative construction by the Court.

KELLY, J. (*dissenting*). I oppose authorizing a discretionary award of attorney fees in interpleader actions for two reasons. First, I believe that most parties bringing an interpleader action do so in the course of their business and, as such, the cost of the action is a cost of their doing business. With respect to those who bring such an action for other reasons, I recognize that some are put to unwelcome and perhaps unfair expense. However, the logic that supports an award of attorney fees to any litigant put to "unfair" expense would justify a general "make the loser pay" rule. I cannot see why many others should not enjoy the same access to attorney fees and costs of litigation as those initiating interpleader actions.

This brings me to my second reason for opposing the rule change. The general rule in this state has long been the "American rule," which requires parties to pay their own attorney fees incurred in civil actions. Few exceptions exist. It is not clear that a common law exception exists in Michigan for interpleading plaintiffs. If it does, this Court rule is unnecessary. If it does not, then this rule will encourage the Court to create others because other litigants are equally entitled to relief. The result will be to undermine the "American rule" and limit access to the courts because of litigants' fear that they may be obliged to pay, not only their own, but other parties' attorney fees and expenses incurred in litigating.

I do not wish to step out on this slippery slope.

CAVANAGH, J., concurs in the statement of Kelly, J.

MARKMAN, J. (*concurring*). The new subrule codifies Michigan decisions that have approved awards of reasonable attorney fees to interpleader plaintiffs. See *Star Transfer Line v General Exporting Co*, 308 Mich 86, 119-120 (1944); *GRP, Ltd v United States Aviation Underwriters, Inc*, 70 Mich App 671, 681 (1976); *Terra Energy, Ltd v State of Michigan*, 241 Mich App 393 (2000). The new subrule is endorsed by the State Bar of Michigan and the Michigan Judges Association. Further, it is consistent with federal case law interpreting FR Civ P 22, despite the lack of express sanction for attorney fees in that rule. See, e.g., *In re Mandalay Shores Cooperative Housing Ass'n*, 21 F3d 380 (CA 11, 1994).

In *Mandalay Shores*, the court observed that an award of attorney fees to an interpleader may sometimes be justified because: (1) the interpleader action will often allow for the efficient resolution of disputes in a single case, rather than in piecemeal litigation, and (2) the interpleading plaintiff is often an innocent, bystander party who has not contributed in any manner to the actual dispute between the claimants.

My dissenting colleagues oppose the new subrule for two reasons. First, they argue that, for interpleader plaintiffs, such actions are merely a "cost" of their doing business. While recognizing that "some are put to unwelcome and perhaps unfair expense[.]" the logic that supports an award of attorney fees to any litigant put to 'unfair' expense would justify a general 'make the loser pay' rule." In response, I would simply suggest that, if there are other areas in which the dissenters believe that persons are put to "unfair expense," and in which there is a proper role to play on the part of this Court, I would be highly supportive of addressing their circumstances as well. The argument of the dissenters is apparently that they will not remedy *any* "unfair expenses" because consistency will then demand that they remedy *all* "unfair expenses."

Second, the dissenters argue, correctly, that there are “few exceptions” to the general “American rule” that requires parties to pay their own legal fees. However, one of these “few exceptions” appears to relate to the very subject of this rule change, interpleading plaintiffs. See, generally, 4 Moore, Federal Practice (3d ed), § 22.06, pp 22-99 to 22-109.

The new subrule clarifies Michigan civil procedure in a fair-minded manner, and the dissenters do not even purport to suggest otherwise. In the end, their argument amounts to little more than “don’t change the status quo because it is the status quo.”